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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-564.

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 OF THE TOWNS OF ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO, STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central School District No. 1; CARL PILLARD, Principal, Addison High School, and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,
Petitioners,

against

CHARLES JAMES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR REHEARING.

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Petitioners,

against

CHARLES JAMES,

Respondent.

No. 72-564

PETITION FOR REHEARING.

The petitioners herein respectfully move this court for an order (1) vacating its denial of the petition for Writ of Certiorari entered on December 4, 1972; and (2) granting the petition.

As grounds for this motion, petitioners state the following:

I.

The full faith and credit clause of the United States Constitution (Article IV, Section 1) requires that the decision of the Commissioner of Education of the State of New York be accorded full faith and credit in the courts of the United States.

After his dismissal, Mr. James brought a proceeding before the Commissioner of Education of the State of

New York pursuant to Section 310 of the New York State Education Law seeking reinstatement.

The proceeding was instituted by formal verified petition prepared by his attorneys. The School Board and the other parties replied by an answer.

At a hearing held before the Commissioner at which Mr. James was represented by one of the counsel who appears for him in the Federal Court proceeding, full argument was made on the disposition of his contentions. Mr. James' petition was denied. He did not appeal or seek review of the decision. Neither did he make the Commissioner a party to the new action he instituted in Federal Court.

The Commissioner of Education is a constitutional officer of the State of New York. (New York State Constitution Article V, Section 4.)

The Education Law (Section 207) refers to the *judicial* functions of the Commissioner of Education. Such functions have been exercised by the Commissioners of Education and their predecessors in New York since 1822 (Laws of 1822, Chapter 256).

The New York Court of Appeals has determined that a decision of the Commissioner of Education is subject to review only in the event it is purely arbitrary and no reasonable person can agree with him on the record before him (*Board of Education v. Allen,* 6 N. Y. 2d 127).

In matters involving educational policy, the New York Court of Appeals has held that such policy decisions are not subject to review at all. *Vetere v. Allen,* N. Y. 2d 259.

It is in the light of that background that the determination of the Commissioner must be read and the following statement in his decision be judged:

> "It is a matter of fundamental educational policy that whatever subject of instruction may be involved, the teacher must present the entire range of information available in relation to such subject. If the subject matter involves conflicting opinions, theories or schools of thought, the teacher must present a fair summary of the entire range of opinion so that the student may have complete access to all the facets and phases of the subject.
>
> "Respondent, in this case, in wearing the black arm band in his classroom, was presenting only one point of view on an important public issue on which a wide range of deeply held opinion and conviction exists."

Since, Mr. James did not seek to review the Commissioner's decision, which he had a perfect right to do, but proceeded in an entirely new action and in a different forum without making the Commissioner a party to the litigation.

Thus, in effect, the court below has formulated its own opinion to supplant the determination of the Commissioner in regard to the educational policy of the State of New York and, in doing so, has given no force or effect to the determination.

II.

The doctrine of collateral estoppel requires that the determination of the Commissioner of Education be sustained.

In *United States v. Silliman*, 167 Fed. 2d 607, the court considered the effect of a New York State Surrogate Court proceeding in the case before it. No opinion was filed in the Surrogate Court nor any findings of fact or conclusions of law filed. Nevertheless, it was determined that the decision in the Surrogate Court was conclusive in the Federal Court.

There the court stated,

> "Nevertheless, we think the record is complete, for it recites points made in the pleadings and the action of the Court upon them. This is not a situation where the record is devoid of information and needs outside evidence to explain what went on. The Government took no appeal. Therefore, whether the conclusion of the learned Surrogate was right or wrong is not now a question which is open to litigation."

It is submitted that the decision of the Commissioner is replete with the factual background of the case and the contentions made by all the parties at the hearing before the Commissioner.

The determinative consideration is stated by the court,

> "We think, further, that the public policy of holding parties to one day in court is one which has recently found firm support and sound extension by the court whose authority binds us. We should not be looking for an opportunity to impose any but the most important limitations on that policy." Page 619.

The decisions quoted by the court in footnote 48 on that page amply sustain that proposition.

To the same effect is the decision in *Magnolia Petroleum Company v. Hunt*, 320 U. S. 430. There, at page 443, the court states,

> "Whether the proceeding before the State Industrial Accident Board in Texas be regarded as a 'judicial proceeding' or its award 'a record' within the meaning of the full faith and credit clause and the act of Congress, the result is the same. For judicial proceedings and records of the State are both required to have 'such faith and credit given to them in every court within the United States as they have by law and usage in the courts of the state from which they are taken.'
>
> "The whole tendency of our decisions under the full faith and credit clause is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot split up his claim and a fortiori, he cannot divide the grounds of recovery."

It is respectfully submitted that no distinction can be drawn between the finality to be given a fully pleaded and argued determination by the Commissioner of Education of the State of New York or the decision of an accident board acting under the Texas Compensation Law.

In *Sunshine Anthracite Coal Co. v. Atkins*, 310 U. S. 381, the same determinative effect was given to a decision of an administrative tribunal.

There, at page 404, the court states,

> "Furthermore, where, as here, Congress has created a special administrative procedure for the

> determination of the status of persons or companies under a regulatory act, and has prescribed a procedure which meets all the requirements of due process the remedy is exclusive."

The same principles are reiterated in *Midessa Television Co. v. Motion Picture, etc.*, 290 F. 2d 203, 5th Cir., cert. den. 368 U. S. 827, where the court stated,

> "There is no better settled principle in the law that a judgment for the merits in one suit is *res judicata* in another where the parties and the subject matter are the same not only as respects matters actually presented to sustain or defeat the right asserted, but also as to any other available matter which might have been presented." *Cromwell v. County of Sack*, 94 U. S. 351.

Later, the court states that

> "Defendant, having voluntarily chosen not to assert any defenses in the New York proceeding is foreclosed from asserting them now. Such matters are *res adjudicata* and a New York judgment must be given full faith and credit." Page 204.

> "• • • the appellee had every opportunity to litigate the case in New York. It failed through its negligence or deliberate omission to do so and was not prevented from doing so by any act of appellee and it may not litigate the issues in a collateral attack upon the judgment." Page 215.

That is exactly what Mr. James did here. Having litigated the matter almost exclusively on the due process question, he now seeks to relitigate the issues, stressing the alleged infringement of his religious rights, matters which he could have fully developed before the Commissioner of Education.

The situation existing is well summed up in *Wayside Transportation Company v. Marcell's Motor Express, Inc.*, 284 F. 2d 868. There, at page 871, the court stated,

> "Due process does not give the parties the right to litigate the same question twice. The constitutional and statutory provisions requiring full faith and credit articulate and implement the dictate of public policy. 'That there be an end to litigation: that those who have contested an issue shall be bound by the results of the contest; and that matters once tried shall be considered forever settled as between the parties.'"

III.

There is a divergence of decisions as to the effect of the decision of the Commissioner of Education. The ruling by the Second Circuit and the ruling in the *United States v. Silliman* by the Third Circuit are not in agreement.

The decision below does not give "full faith and credit" to the determination of the Commissioner of Education; neither does it apply the doctrine of collateral estoppel.

Under the ruling in the *Silliman* case, faith and credit was given and collateral estoppel was applied in a similar situation.

Conclusion.

For the reasons set forth above, as well as those contained in the petition for Writ of Certiorari, petitioner prays that this court grant rehearing of the order of denial, vacate the order, grant the petition to review the judgment and opinion below.

Dated: January 3, 1973.

Respectfully submitted,

HARRY TREININ,
Counsel for Petitioner.

Certificate of Counsel.

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

HARRY TREININ